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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 09 2007

EAC 00 099 50047

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the employment-based immigrant visa petition. Subsequently, the director determined that disqualifying circumstances had arisen. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner originally based his petition on his research in physical chemistry. The petitioner asserted that an exemption from the requirement of a job offer, and thus of a labor certification, was in the national interest of the United States. The director revoked the approval of the petition because the petitioner had begun working in a field unrelated to physical chemistry.

In its June 30, 2006 decision (incorporated here by reference), the AAO concluded that the waiver is linked to the alien's employment and that the petitioner's only involvement in the field of physical chemistry was "completely divorced from his employment" in the financial services industry. On motion, counsel asserts that the AAO erred in requiring paid employment in the field. The petitioner submits a letter from his collaborator and, subsequently, additional articles in his field. The regulation at 8 C.F.R. § 103.3(a)(2)(vii) allows for limited circumstances in which a petitioner can supplement an already-submitted appeal. This regulation, however, applies only to appeals, and not to motions to reopen or reconsider. There is no analogous regulation that allows a petitioner to submit new evidence in furtherance of a previously-filed motion.

As previously stated by the AAO, section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa

application process. *Id.* at 589. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

Regarding the benefit sought, section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

As of the date of filing, the date on which the petitioner must establish his eligibility, the petitioner held a Master's degree in Physics from Fudan University and was a Ph.D. candidate. While the petitioner is subsequently addressed as "Dr.," the record does not contain his Ph.D. degree. The petitioner's initially proposed occupation and his current occupation fall within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest

> with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Commr. 1998)[hereinafter "NYSDOT"], has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

As noted in the AAO's initial decision, the petitioner filed the petition on February 11, 2000, at which time he was studying for a Ph.D. in physical chemistry at New York University (NYU). Under Part 6 of the petition, which requests information about the proposed employment, the petitioner responded "NATIONAL INTEREST WAIVER." As required, the petitioner submitted Form ETA-750B, Statement of Qualifications, with the petition. On this form, under "Occupation in which Alien is Seeking Work," the petitioner wrote "Physical Chemistry." In a statement accompanying the initial filing, counsel stated:

> [The petitioner is an] outstanding physical chemist who has made important seminal contributions to the theory of optical properties of solids, in particular to the understanding of the non-linear optical properties of materials. [The petitioner's] research discoveries are critical to the deeper understanding and improvement of lasers and laser crystals. [The petitioner] has also made other independent research contributions to the understanding of the mathematical basis of nonlinear optical response theory.

The reference letters accompanying the petition discussed mathematics and computational modeling. On August 25, 2000, the director issued a request for evidence, indicating that the initial submission was not sufficient to establish the petitioner's eligibility for the waiver. In response, the petitioner submitted several additional reference letters and other materials. This second group of letters contains general praise of the petitioner such as the comment by [redacted] of the University of Durham, England, that the petitioner's "methods have had a considerable impact on our understanding of the physics of surfaces." As noted by the AAO, the new letters mention the petitioner's mathematical skills not in their own right, but in the context of how those skills allow the petitioner to make important scientific contributions to the field of physical chemistry.

On November 27, 2000, the director approved the petition. On March 1, 2001, the petitioner applied for adjustment to permanent resident status. On March 26, 2002, in furtherance of the adjustment application, the director instructed the petitioner to: "Submit an original letter on company letterhead from your prospective employer . . . stating their continued interest in hiring you, duties to be performed, and remuneration." In response, the petitioner submitted a letter from payroll analyst [redacted] of Bloomberg LP, indicating that Bloomberg hired the petitioner on June 25, 2001, and that the petitioner "currently holds the position of Software Developer in our Research & Development department." [redacted] indicates that the petitioner's duties "are data analysis and calculations, applying his background in mathematics and in computer programming."

On February 5, 2004, the director issued a notice of intent to revoke, stating: "You were approved for a National Interest Waiver as a physical chemist, but you are trying to adjust status as a software developer. Please submit evidence that you are working as a physical chemist." In response to this notice, counsel asserted both that the petitioner continued to work in the area of physical chemistry at NYU and that the petitioner's position at Bloomberg required similar expertise.

The petitioner submitted a letter from [redacted] who supervised the petitioner's doctoral studies at NYU, asserting that after obtaining his Ph.D., the petitioner continued to perform research in the area of physical and theoretical chemistry. [redacted] identified three published articles that he co-authored with the petitioner. As noted by the AAO, [redacted] does not indicate how much time the petitioner devotes to this ongoing collaboration or indicate the amount of remuneration. The petitioner also submitted a letter from [redacted] human resources representative at Bloomberg. [redacted] discusses the petitioner's work at Bloomberg and the relevance of his education to his work there as a software developer.

On June 16, 2005, the director revoked the approval of the petition, concluding that the petitioner was not sufficiently employed in the field of physical chemistry and noting that his current employment was amenable to the alien employment certification process.

On appeal, counsel asserted that the petitioner's current position at Bloomberg relies on the same "computational expertise central to [the petitioner's] training in chemical physics."

The AAO noted:

> The waiver, however, did not rest on the petitioner's "training" but rather on the use to which he was putting that training. Prior to the approval of the petition, this same attorney repeatedly emphasized the impact of the petitioner's work within the fields of physics and chemistry, rather than the more general value of the petitioner's expertise in computers and mathematics. Witness letters in the petitioner's initial submission contained a fair amount of discussion of the petitioner's mathematical and computer skills, but the director found that initial submission to be insufficient. Only after the petitioner provided more specific evidence about the value of the petitioner's work *as a physical chemist* did the director find that the petitioner had met his burden of proof.

> Given this documented history of the proceeding, it is clear that the director approved the petition not because of the petitioner's math and computer skills, but because the petitioner was said to be making important contributions to the disciplines of physics and chemistry.

(Emphasis in original.) The AAO also rejected the relevance of section 106(c) of the American Competitiveness in the Twenty-First Century Act (AC21), noting that the stated ground for revocation is not the petitioner's change of employers, but, rather, that he is no longer employed in the same or similar occupational classification that served as the basis for the national interest waiver. The AAO acknowledged [redacted] concerns that the petitioner would be forced to leave the United States, but noted that the alien employment certification process remained available to the petitioner's employer.

In a supplement to the appeal, counsel no longer focused on the petitioner's job at Bloomberg; rather, counsel stated: "the only issue on appeal is whether the petitioner continues to be active in his field. The petition was revoked because it was alleged that the petitioner was no longer continuing to do work in the same field in which he was originally approved for national interest waiver."

The petitioner submitted several letters from researchers who assert that the petitioner continues to be an active researcher in the field of physical chemistry. The AAO acknowledged that these letters attested to the national interest inherent in the petitioner's research in physical chemistry and the caliber of the authors of these letters. The AAO noted, however, that these witnesses are all employed at academic research institutions rather than in the financial services industry. The AAO contrasted such academic research, inextricably bound with the researcher's career, with the petitioner's research, which he could stop without affecting his paid employment at Bloomberg. The AAO concluded:

> The petitioner seeks an immigrant classification that the statute, at section 203(b) of the Act, specifically terms "employment-based." The waiver is not universally available to all aliens; it is restricted to certain categories that, in turn, are defined by occupation. The waiver is, therefore, inseparably linked to employment. Unpaid research that the petitioner conducts in his spare time is not, by any reasonable definition, "employment." The AAO will not speculate on what the director would have done if, after receiving the notice of intent to revoke, the petitioner had secured employment as a physical chemist. As it is, the petitioner has been either unwilling or unable to secure employment in the field of physical chemistry, despite having made what several witnesses have described as a series of important contributions to that field. The petitioner has never been employed in the field of physical chemistry except in positions ancillary to graduate study. The record is, therefore, devoid of evidence to suggest that the petitioner seeks employment as a physical chemist, or that NYU or any other entity intends to employ him in that capacity. Third-party assurances that the petitioner will continue performing research as what essentially amounts to a hobby cannot suffice as a basis for permanent immigration benefits. The petitioner received a national interest waiver based on a fairly narrow set of circumstances. When he applied for the waiver, the petitioner gave no indication that he intended to work in finance, while volunteering with his former professor at NYU.

On motion, counsel reiterates his previous assertions that the petitioner "has been actively productive in his field, publishing papers, collaborating with colleagues in research, answering the questions of his colleagues in the field, and pursuing all the conventional activities of a chemical physicist." Counsel asserts that the petitioner holds an identification card for NYU, has laboratory space there and "has received the acclaim of his peers for his ongoing groundbreaking research that is now being recognized as transforming his field." Counsel asserts that, like New York Mayor [redacted] who serves as mayor without pay, the petitioner holds a paying job in one field but is pursuing research "at his own expense." Counsel then notes that [redacted] published major articles in physics while employed as a patent examiner. In addition, counsel asserts that artists, writers, actors and musicians have been granted national interest waivers despite needing to supplement their income in other fields. The petitioner submits a new letter from [redacted] asserting that he offered the petitioner a research position, which the petitioner has declined and asserting that, in addition to his employment at Bloomberg, the petitioner spends 25 to 30 hours a week performing research at NYU. Finally, counsel asserts that the requirement for a paying job in the beneficiary's area of expertise was explicitly rejected in *NYSDOT*.

In *NYSDOT,* the Commissioner acknowledged that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for an alien employment certification. *NYSDOT,* 22 I&N Dec. at 218, n.5. The decision further states that while this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of an alien employment certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *Id.* Being self-employed is not the same thing as being employed in a separate field and spending one's spare time in the field of expertise. Nothing in *NYSDOT* suggests the alien need not be employed in his field of expertise, whether through employment for an employer or through self-employment by which the alien is making a living in his field.

While we do not question [redacted]s position as mayor, his decision to forego or donate his salary is not relevant to the matter before us. The position of mayor is a salaried position. Moreover, Einstein's position as a patent examiner at the time he published his most significant work is equally irrelevant. The issue is not whether it is technically possible to perform valuable research while employed in an unrelated position. Rather, the issue is whether the national interest waiver is appropriate for benefits deriving from volunteer services rather than paid employment. Counsel points to no precedent decision or other binding authority suggesting that any exemption of employment in the field is made for artists, writers, actors or musicians seeking an employment-based visa.

In publishing the final regulations relating to this classification, legacy Immigration and Naturalization Service (INS) stated:

> The Service has consulted with Congressional sources and the Department of Labor on [the issue of whether the waiver of the job offer constitutes a waiver of the alien employment certification] and all parties are in agreement that exemption from, or

> waiver of, the job offer constitutes waiver of the labor certification. The final rule reflects this determination.

Employment-Based Immigrants, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991). Legacy INS then removed proposed language that would have required the alien to show that he was in a traditionally self-employed occupation. *Id.*

Thus, the fact that the national interest waiver exempts the petitioner from the alien employment certification process does not suggest that he need not establish his intention to be employed in his field of expertise. Significantly, even the highest classification, aliens of extraordinary ability under section 203(b)(1)(A) of the Act, which never requires an alien employment certification, requires, by statute, that the alien be seeking to continue *working* in his area of expertise. Section 203(b)(1)(A)(ii); *see also* 8 C.F.R. § 204.5(h)(5). In addressing the employment-based immigrant categories at the time of enactment, Congress stated that while the majority of employment-based immigrants will require employer attestation as to the recruitment of U.S. workers, wages, and working conditions, the bill exempts certain categories. H.R. Rep. No. 101-723, 58 (Sept. 19, 1990). Nevertheless, Congress stated that the bill would only allow all employment-based immigrants to enter "for employment." *Id.* Thus, it is clear that Congress intended all employment-based immigrants, whether subject to the alien employment certification process or not, to demonstrate an intention to be employed in their field of expertise.

In light of the above, the petitioner has not overcome the AAO's concerns that the petitioner was not seeking to enter the United States to work in the area of expertise for which the national interest waiver was initially approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The AAO's decision of June 30, 2006 is affirmed. The petition is denied.